RAJA SEGARAN KRISHNAN *a*

v.

BAR MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[CIVIL SUIT NO: S2-23-33-2000]
22 JUNE 2000

CIVIL PROCEDURE: *Jurisdiction - Contempt of court - Interlocutory injunction sought - Whether all matters relating to injunctions must be filed at Appellate and Special Powers Division of the High Court - Whether interlocutory application for injunction can be heard by Court 2 of the Civil Division of the High Court - Whether existence of prayer on contempt in plaintiff's pleadings sufficient to allow Court 2 of the Civil Division of the High Court to hear matter - Whether question of division of work purely administrative - Practice Direction No 1 of 1989* *c* *d*

CIVIL PROCEDURE: *Contempt of court - Criticism, accusations and harassment against judges - Statements to such effect allegedly made - Whether making of statements ought to be confirmed - Whether reliance may wholly be placed on newspaper reports* *e*

CIVIL PROCEDURE: *Judge - Judge to recuse himself - Application for - Alleged bias - Previous matter involving same parties based on different issues heard by judge - Whether judge ought to recuse himself from hearing subsequent matter involving same parties* *f*

CIVIL PROCEDURE: *Judge - Judge to recuse himself - Application for - Alleged bias - Matter involving Malaysian Bar - Whether fact that judge's son a member of the Bar a relevant consideration - Whether judge ought to recuse himself* *g*

The plaintiff filed a civil suit against the defendants praying for, *inter alia*, a declaration that the proposed extraordinary general meeting of the Malaysian Bar ("the EGM") to deliberate matters relating to allegations against the Chief Justice of Malaysia purportedly made by one Datuk Dr Rais Yatim ('the Minister') in a newspaper report constituted contempt of court. There was, however, no confirmation obtained by the Malaysian Bar that the Minister stood by what was attributed to him in the said report. Upon filing the civil suit, the plaintiff applied for an injunction to stop the holding of the EGM. *h* *i*

Three preliminary objections were taken by the first defendant. Firstly, it was argued that this court had no jurisdiction to hear this case because pursuant to Practice Direction No 1 of 1989, all matters relating to injunctions ought to be filed at the Appellate and Special Powers Division of the High Court. As against this, the plaintiff argued that since another Practice Direction dated 20 October 1999 had directed that all matters relating to libel, slander, contempt and matters relating to foreclosure and caveat ought to be filed in Court 2 of the Civil Division of the High Court, he elected to file this matter in this court.

Secondly, the defendant argued that the learned judge ought to recuse himself from hearing this case because he had heard another case wherein the same plaintiff had also applied to stop the Malaysian Bar from holding an extraordinary general meeting. However, the defendant admitted that the issues before the court in the instant case were not similar to the issues as found in the earlier case.

Thirdly, the defendant contended that since the learned judge's son is a member of the Malaysian Bar, it would be improper for him to hear the instant matter.

Held:

[1a] This court is a properly constituted court and pursuant to the Courts of Judicature Act 1964 it has the power to hear all matters filed in West Malaysia. The question of division of work is purely administrative, and to facilitate control of the matters within his jurisdiction the Chief Judge of Malaya has created various divisions.

[1b] In any case, there was a specific prayer in the writ seeking a declaration that the first defendant and its agents were in contempt. It could not be the case of the defendant that this court ought to hear only this prayer and then transfer the file with the directions of the Chief Judge to another judge of another division to hear the rest of the prayers. Nor could it be argued that the plaintiff ought to file for contempt before this judge and seek his remedies in respect of the other prayers by filing another suit to be heard by another judge. Since this court is the designated court to hear all contempt matters, so long as there is a prayer for contempt in the pleadings then all matters in respect of this particular suit ought to be heard in this court.

[2] If the issues in the earlier case were not similar to those in the instant case, there was no reason for the judge to recuse himself. The judge had actually not heard these matters relating to the allegations involving the Chief Justice, and since these were not put for decision before him it was totally misleading to say that he had heard the matters.

[3] There could be no interest that a judge might derive by his son being a member of the Bar if he were to hear this case. In the instant case, the conduct of the Chief Justice was a matter of public concern and therefore the judge's son being a member of the Bar could not be a reason for the judge to recuse himself.

[4] Great injustice would befall the Minister, the Chief Justice and all others reportedly having made statements whose quotations had been exhibited by the defendants, if they denied having made such statements. It would have been a simple process for the Malaysian Bar to obtain a simple letter from the Minister stating that he stood by the report attributed to him. There was no basis to call for the EGM on allegations attributed to someone who had not even been asked to verify its truth.

[Preliminary objections dismissed; first defendant injuncted from convening EGM.]

Case(s) referred to:

C Ravichandran Iyer v. Justice AM Bhattacharjee & Ors SCC [1995] (Vol 5) 457 ***(refd)***

Hampshire County Council v. Gillingham & Anor (5 April 2000) ***(foll)***

Lockabail (UK) Ltd v. Bayfield Properties Ltd [2000] 2 WLR 870 ***(refd)***

Raja Segaran S Krishnan v. Bar Council Malaysia & Ors [2000] 1 MLJ 1 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor & Another Appeal [1995] 3 MLJ 549 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 41 r. 5(2)

For the plaintiff - DP Vijandran (P Selvaraj with him); M/s DP Vijandran Assoc

For the defendants - Mohamad Ariff Md Yusof (Ambiga Sreenevasan, Ranjit Singh, Christopher Leong & Gopal Sreenevasan with him); M/s Chooi & Co

Reported by S Dharmendran

JUDGMENT

RK Nathan J:

The plaintiff is a member of the Malaysian bar. The 1st defendant is a body corporate established under the Legal Profession Act 1976. For the purposes of the present application, only the 1st defendant is involved. The plaintiff filed a civil suit against the 1st defendant and 11 others being the exco members of the 1st defendant. The matter that initiated the filing of this suit was a circular of the bar council dated 8 June 2000 and addressed to all members of the bar council which reads as follows:

> BY FAX ONLY AMENDED
>
> VERY URGENT
>
> Members of the Bar Council
>
> **RE: Extraordinary General Meeting of the Malaysian Bar**
>
> The Executive Committee has unanimously recommended the convening of an Extraordinary General Meeting of the **Malaysian Bar** to be held as soon as possible to deliberate and pass resolutions on matters relating to the allegations made by Datuk Dr. Rais Yatim against the Chief Justice.
>
> Ex-co will meet again on Thursday, 8 June 2000 at 5.30 p.m. to consider the resolutions to be tabled at the forthcoming EGM.
>
> Could members of the Bar Council kindly respond by telephone or fax to reach Catherine or me by 4.00 p.m. Thursday 8 June 2000 whether they support the Ex-co recommendation.
>
> Dated: 8 June 2000
>
> Sgd.
>
> Haji Kuthubul Zaman Bukhari
> Secretary

Then again on 10 June 2000 the exco issued a public statement entitled "bar council public statement on the proposed general meeting of the bar". The plaintiff *inter alia* has prayed for various declarations including a declaration that the said public statement and the proposed resolution and the proposed general meeting and the publication of the purported notice in the press, constitute contempt of court. There was also a prayer for an interim and a permanent injunction with damages and costs.

Upon filing the said suit the plaintiff immediately took out a summons and prayed for an injunction to stop the 1st defendant or its servants or agents from holding the extraordinary general meeting on 23 June 2000 and for consequential reliefs and costs. As the matter was of extreme urgency I decided to hear the case immediately.

Findings of the Court

Encik Ariff Yusof for the defendant indicated that he would take preliminary objections on the plaintiff's case.

(i) Jurisdiction of the Court

Referring to practice direction 1/89 Encik Ariff argued that I had no jurisdiction to hear this case simply because pursuant to the said practice direction all matters relating to injunctions ought to be filed at the appellate and special powers division of the High Court. As against this D.P. Vijendran pointed out that litigants merely file in the division they think their case ought to be heard. As the present case was geared towards contempt proceedings and as the solicitor for the plaintiff he was of the view that since the latest practice direction dated 20 October 1999 had directed that all matters relating to libel, slander, contempt and matters relating to foreclosure and caveat ought to be filed in court 2 of the civil division of the High Court, he elected to file this matter in this court. Further he also pointed out that pursuant to the said circular from the chief judge Malaya I had no power to transfer this case on my own volition to any other judge.

There is a short answer to this objection. This court is a properly constituted court and pursuant to the Courts of Judicature Act 1964 I have the power vested upon me to hear all matters filed in West Malaysia. The question of division of work is purely administrative and to facilitate control of the matters within his jurisdiction, the chief judge had created various divisions. There is therefore no question of this court having no jurisdiction to hear this matter.

In any case perusing the writ I find that there is a specific prayer seeking a declaration that the 1st defendant and its agents are in contempt. It cannot be the case of the defendant that I hear only this prayer and then transfer the file with the directions of the chief judge to another judge of another division to hear the rest of the prayers. Nor can it be argued that the plaintiff ought to file for contempt before me and seek his remedies in

respect of the other prayers by filing another suit to be heard by another judge. Since this court is the designated court to hear all contempt matters and so long as there is a prayer for contempt in the pleadings then all matters in respect of this particular suit ought to be heard in this court. The plea of lack of jurisdiction is ill-founded.

(ii) Judge to Recuse Himself

It was the case of the defendant that I ought to recuse myself from hearing this case because I had heard another case, namely, *Raja Segaran a/l S. Krishnan v. Bar Council Malaysia & Ors* [2000] 1 MLJ 1 wherein the same plaintiff applied to also stop the Malaysian Bar from holding an EGM. Having said this, I was astounded to hear Encik Ariff submit that it is the case of the defendants that the issues before me today are not similar to the issues as found in the earlier case. If the issues are not the same then I see no reason why I have been asked to recuse myself. In response to this, D.P. Vijandran referred me to paras. 21 and 22 of his client's affidavit in support of the application for this injunction. He pointed out that in Kuala Lumpur High Court Civil Suit No. S2-23-42-1996 where there was an application to amend the defence and which application I had refused and which is now under appeal, and in Kuala Lumpur High Court Civil Suit S2-23-93-99 where the said proposed amendment had already been incorporated as part of the defence, and that in both these cases I had actually not decided on the allegations contained in the proposed amendment nor had I heard the matter in the other civil suit. Therefore, he argued that it was wrong for the defence to say that I ought to recuse myself on the basis that I had heard the matter. Having checked through the facts I agree with Mr. Vijandran that in these matters relating to the allegations involving the chief justice being the subject of the proposed amendment and the subject of the defence in the other suit, I have actually not heard these matters and that since these were not put for decision before me, it is totally misleading to say that I have heard the matters. The allegation has only been put as part of the defendant's case in S2-23-93-99. There is therefore no merit in this argument.

(iii) Judge's Son being a Member of the Bar

The next argument of the defence was that since my son is a member of the bar it would be improper for me to hear this matter because there might be a perception that if I grant the injunction then I might reflect my

son's views or if I refuse the injunction, it might be perceived that I was favouring my son's membership of the Bar. The defendant relied on *Lockabail (U.K.) Ltd v. Bayfield Properties Ltd* [2000] 2 WLR 870 and in particular to p. 882 of the said judgment where their Lordships in handing down the judgment said as follows:

> In any case where the Judge's interest is said to derive from the interest of the spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the Judge himself.

To my mind the defendant has totally misconstrued the rationale behind this statement. What their Lordships intended was that if a member of the judge's family was a director or a shareholder of a company then it would be improper for the judge to sit in judgment where the said company is involved. This is common sense and the judge ought not to hear the case to avert any allegation of bias or partiality. But in this case, every practising lawyer is compulsorily bound by the Legal Profession Act 1976 to be a member of the Malaysian bar, failing which he will not be issued with a practising certificate. Further, there can be no interest that the Judge can derive by his son being a member of the bar if he were to hear this case. A very recent decision, namely, *Hampshire County Council v. Gillingham & Anor* of the English Court of Appeal handed down on 5 April 2000 and obtained through Mr. D.P. Vijandran's research via the Internet, was of great assistance to this court. The case is therefore not reported and I have to merely rely on the date it was delivered for its reference. In that case their Lordships in the Court of Appeal clearly expounded the distinction between a private and the public right affecting the question of partiality and the need for a judge to recuse himself. The case itself is highly complicated in relation to the facts and therefore I do not intend to narrate the facts. Suffice it for me to say that Brooke LJ said at p. 13 of the said judgment as follows:

> In my judgment there is no good reason for setting aside this judgment on the basis that there was a real danger of bias arising from the fact that Judge Rudd tried the case. The fact that he took the precaution of recusing himself in connection with the action concerned with determining Mr. Drummond's private rights once the Gillinghams had shown themselves sensitive to the prospect of having that case tried by any Judge who had any prior knowledge of Mr. Drummond, cannot possibly mean, in itself, that he should have recused himself in determining this action which was concerned not with private rights but with public rights.

In the case before me the defendant argues that the conduct of the chief justice is a matter of public concern. Since it is their own contention that the matter relates to the public's right to discuss this matter, clearly therefore my son being a member of the bar cannot be a reason for me to recuse myself. I am further disheartened that the members of the bar with such large membership could not have the benefit of the same Internet research that Mr. D.P. Vijandran had, for, if they had been equally indulgent there might have been no need to have taken this futile point at all.

On the above findings I dismissed the preliminary objections with costs to be taxed and to be paid to the plaintiff in any event. I then proceeded to hear the substantive application. Before Mr. Vijandran could proceed with his application, the court asked Encik Ariff the following questions:

> Court:
>
> To be fair to Datuk Dr. Rais Yatim has he in fact made any allegations against the Chief Justice since you have in your circular referred to the allegations made by Datuk Dr. Rais Yatim? Have you written to Datuk Dr. Rais Yatim for his confirmation that he stands by what is attributed to him as his report at page 17 to Enclosure 8 being the affidavit of Haji Sulaiman Abdullah?
>
> Encik Ariff:
>
> The answer, my Lord, is no.

At p. 17 of Encl. 8 the defendant had exhibited a newspaper report allegedly made by the minister in the Prime Minister's Department, Datuk Dr. Rais Yatim. It is obvious therefore that there is no basis for the Malaysian bar to contend that there were allegations made by Datuk Dr. Rais Yatim. Whilst conceding that all the reports were hearsay evidence Ecik Ariff argued by referring to O. 41 r. 5(2) of the Rules of the High Court 1980 (the RHC) which reads as follows:

> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

And in support of this Encik Ariff referred me to the judgment of the Supreme Court in *Wee Choo Keong v. MBf Holdings Bhd & Anor & Anor Appeal* [1995] 3 MLJ 549 where Chong Siew Fai CJ (Sabah and Sarawak) had held that although hearsay evidence in affidavit is admissible

under O. 41 r. 5(2) of the RHC, the court should ensure that no injustice results from its admission. I whole-heartedly accept this view. Great injustice would befall Datuk Dr. Rais Yatim, the Chief Justice and all others reportedly having made statements whose quotations have been exhibited by the defendant, if they deny having made such statements. It would have been a simple process for the Malaysian bar to have obtained a simple letter from Datuk Dr. Rais Yatim stating that he stands by the report attributed to him. In any case, Mr. Vijandran pointed out that in the affidavit of Haji Sulaiman Abdullah (Encl. 8) there is no statement by him that he believes the contents to be true. It seems to me that whilst the Malaysian bar is making a serious allegation by calling for the suspension of the chief justice or for his removal, they are prepared to do so on mere unsupported allegations without even giving any thought to the principle of natural justice by seeking confirmation from Datuk Dr. Rais Yatim if the contents of the report as contained in the newspaper cutting as attributed to him were actually spoken by him. There is no doubt that there are times when the Press does not always report what was actually said. It is very relevant to refer to the decision of the Indian Supreme Court in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee & Ors SCC* [1995] (Vol. 5) 457 where K. Ramaswamy J said at p. 479 as follows:

> The threat of action on vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer - in one word, the unpopular. Insidious attempts pave way for removing the inconvenient. Therefore, proper care should be taken by the Bar Association concerned. First, it should gather specific, authentic and acceptable material which would show or tend to show that conduct on the part of a Judge creating a feeling in the mind of a reasonable person doubting the honesty, integrity, impartiality or act which lowers the dignity of the office but necessarily, is not impeachable misbehaviour. In all fairness to the Judge, the reasonable office bearers should meet him in camera after securing interview and apprise the Judge of the information they had with them. If there is truth in it, there is every possibility that the Judge would mend himself. Or to avoid embarrassment to the Judge, the office bearers can approach the Chief Justice of that High Court and apprise him of the situation with material they have in their possession and impress upon the Chief Justice to deal with the matter appropriately.

In this case, it is obvious to me that what the bar says is "we say, that the newspaper says that Dr. Rais Yatim says, so and so". As put by Mr. Vijandran, this is hearsay thrice compounded. The bar council in its public statement on the proposed general meeting of the bar said "the bar as the

natural friends, protectors and guardians of the sanctity of the judiciary is left with no option but to examine the whole matter and proposed solutions at a general meeting". It seems paradoxical that having proclaimed itself as the friend, protector and guardian of the sanctity of the judiciary, the Malaysian bar has totally ignored the basic precept of failing in its duty to listen to the other side. It listened albeit to unsupported statements allegedly attributed to the minister in the Prime Minister's Department and it rushed head on with its avowed aim of calling a meeting to discuss publicly no doubt within its confines, the conduct and behaviour of the highest official of the judiciary. Yet whilst pretending to protect the sanctity of the judiciary, it did not accord the chief justice the right to be heard before they even thought of convening this meeting. Ms. Ambiga S. also for the defence submitted that the Bar was not concerned with the truth or otherwise of the allegations but that they were actually defending the institution of the administration of justice and that because there is a public debate raging they wish to debate it themselves. Is not this condemning a person even without hearing that person. If the Malaysian bar is not concerned with the truth or otherwise of the allegations but want to have this meeting only to satiate their hunger for a public debate over the chief justice by wresting the discussion from the general public and by so doing trying to show that they are protecting the sanctity of the judiciary, it seems to me that this effort is totally misconceived. To my mind there is no basis to call for an extraordinary general meeting on allegations attributed to someone who has not even been asked to verify its truth. There is no need for me to ask the plaintiff to even go into the merits of his application. On this one basic preliminary issue alone the 1st defendant has been unable to satisfy me. I therefore grant the plaintiff an order injuncting the 1st defendant or its servants or agents from convening the extraordinary general meeting fixed for 23 June 2000. I also order that the 1st defendant to pay the plaintiff the costs of this application to be taxed.